Petition

81-1858

Supreme Court, U.S.
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ALEXANDER L. STEVAS
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

NO.

KENNETH COBBS,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

David E. Boone, Esquire
George Wm. Warren, IV, Esquire
Suite 116, Shockoe Center
11 South Twelfth Street
Richmond, Virginia 23219

Counsel for Petitioner

QUESTION PRESENTED

Whether Petitioner adequately and procedurally proved that the false statements in the affidavit for the search warrant were sufficient to suppress the evidence seized therefrom in violation of his Fourth and Fourteenth Amendment rights.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Petitioner, Kenneth Cobbs, petitions this Court for a Writ of Certiorari to review the judgment of the Supreme Court of Virginia.

OPINION BELOW

Petitioner filed a petition for appeal to the Supreme Court of Virginia from convictions in the Circuit Court of the County of Henrico on September 1, 1981. By its Order dated December 28,

1981, a copy of which is appended to this Petition, that Court refused the Petition for Appeal.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257 (3).

QUESTION PRESENTED

Whether Petitioner adequately and procedurally proved that the false statements in the affidavit for the search warrant were sufficient to suppress the evidence seized therefrom in violation of his Fourth and Fourteenth Amendment rights.

STATMENT OF THE CASE

A. Course of Proceedings

Petitioner was tried in a bench trial on March 27 and May 13, 1981, on indictments charging felonious possession with intent to distribute more than one half ounce, but not more than five pounds of marijuana and felonious possession of cocaine, a schedule II controlled substance. On the first charge he received a ten year penitentiary sentence with five years suspended for a period of twenty years. On the latter charge he received the same sentence with the penitentiary sentence to run consecutively.

The following Assignment of Error was contained in his Petition for Appeal to the Virginia Supreme Court:

That the affidavit for the

search warrant contains false information which, when corrected, lacks the requisite probable cause. Consequently, the Judge erred in denying Appellant's motion to suppress the evidence seized pursuant to said warrant.

B. Facts

Petitioner was arrested by Henrico County, Virginia police on September 12, 1980. Seized from his automobile were marijuana and cocaine. A search warrant was executed on the vehicle after Petitioner had been arrested. The affidavit for the warrant read as follows:

> On September 11, 1980 at approximately 11:30 P.M. while on stationary survillance (sic) at the Sunoco station at the intersection of I64 and Laburnum Ave. located in Henrico County, this affiant observed a black over gray 1976 Cadalic (sic) Virginia Lic. VEY-793 pull into the lot. A short time later a red Chev. driven by a black male pulled into the lot near the

Cadilic (sic). The black male in the red Chev. got out of his vehicle and went to the driver of the Cadalic (sic). The driver of the Cadalic (sic) who was a black male also got out of his car and went to the trunk and took out a black sackel (sic). He then got back into the Cadalic (sic), and the other subjec (sic) got back into the red Chev. and left. At this time a blue vehicle pulled into the lot at which time the driver of the Cadalic (sic) went over and got into this vehicle. Subject returned to the Cadalic (sic) and got a small package and returned to the ble (sic) vehicle. This subject then got out of the blue vehicle and the car drove off. This black male then went and used the phone and then left.

On September 12, 1980 this affiant was on stationary survillance (sic) at the Sunoco station on Laburnum Ave. at its intersection with I64 when he observed this same black over gray 1976 Cadalic return to the station, at approximately 11:30 PM. At approximately the same time a green Lincoln bearing Va. License JVG-3 pulled into the lot also. The driver of the Cadalic (sic) gets out and goes to the Lincoln and gets into the vehicle. He then gets out of

the Lincoln and returns to his car and gets a small plastic bag out of the trunk and returns to the Lincoln. At this time this affiant and several other officers approach these subjects and find a small bag of marijuana in there (sic) possession. The black male driving the Cadalic (sic) was ordered out of his vehicle at which time he got out and left the door open. This affiant observed a large brown plastic bag pushed between the floor and the seat at this time.

At approximately 0200 hours Investigator Kevin D. Macafee of the Chesterfield County Police Dept. arrived with his dog Kennedy who has Customs Brand #0237 a graduate from class #89 of the U.S. Customs Detector Dog School Front Royal Va. on July 18, 1980. Kennedy is certified on detection of Hash, Marijuana, Cocaine, and Heroin after completing a 480 hour course. The dog was placed near the vehicle and indicated to his handler there was drugs of some type in the brown bag inside of the 1976 black over gray Cadalic (sic).

Base (sic) on the information in this affidavit I firmly

> believe that there are now illegal drugs inside of the 1976 black over gray Cadalic (sic) Virginia Lic. VEY-793 located on the parking lot of the Sunoco Station at I64 and Laburnum Ave. in Henrico County.

Upon a motion to suppress evidence, a hearing upon which as agreed by the parties was held contemporaneous with the trial, Petitioner sought to suppress from evidence the drugs and other material seized from the vehicle. The original basis for the motion was that the affidavit did not establish probable cause for the search. After the testimony of the arresting officer, Petitioner also argued that there had been materially false statements in the warrant which should have vitiated it and the evidence

seized pursuant to it.

At trial and upon the motion hearing the facts of the arrested were developed as follows: On September 11, 1980, police officer William H. Pridemore was on stationary surveillance at a service station in Henrico County. There had been several break-ins of vehicles on the lot which gave rise to the police surveillance. At approximately 11:30 p.m., while the station was closed, he observed a black over gray 1976 Cadillac pull into the driveway area of the station. Petitioner, driver of the vehicle, was observed by Pridemore to get out of the car, go to the trunk of the vehicle, remove an item, and get back into the vehicle. Within a minute a red vehicle pulled on to the lot next to

Petitioner's vehicle. An exchange was made between these two subjects in these cars and the red car left. Shortly thereafter, a blue car pulled onto the lot. At this time Petitioner got out of his car, walked over to the blue vehicle, then returned back to his vehicle at which time the blue car left the lot. Pridemore could not testify as to what, if anything, took place between Petitioner and the driver of the blue car. After the blue car left the lot, Petitioner got back into his automobile and drove away.

The next night, September 12, 1980, Pridemore again was placed on stationary surveillance at the gas station. At 11:30 p.m., Petitioner pulled into the service station lot

in the same manner in which he did the previous night. He got out of his vehicle, opened the trunk of his car and took a brown bag out and placed it in the passenger compartment of his car. Subsequently, a green Lincoln pulled into the service station lot. At this time, Petitioner got out of his vehicle, got into the Lincoln for just a second or two, returned back to his vehicle and removed a small plastic bag, which he had in his hand as he left his vehicle. Petitioner walked back over to the Lincoln and got inside. He was in the Lincoln for maybe fifteen or twenty seconds. He got back out and returned to his vehicle and got inside. At this time Pridemore and two other police officers appre-

hended both individuals. The green Lincoln was searched and a plastic bag containing marijuana was taken from the front seat. The driver was sitting on it.

A police officer told Petitioner to get out of his automobile. When he did so, the driver's side door remained open. The interior lights were on inside the vehicle. Pridemore placed him under arrest at this time and in plain view could see a brown plastic type of bag halfway out from underneath the driver's seat. Pridemore testified that he could not see into the bag. Pridemore contacted officer Sherry of the Henrico Vice Unit and asked for his assistance. Additionally, Pridemore put in the request that officer

MacAfee of another police jurisdiction respond with a dog trained in the detection of narcotics.

Pridemore testified MacAfee responded with his drug dog. MacAfee placed the dog next to the Petitioner's car and the dog made a trip around the car and then went into the car. The dog went into the back seat and smelled around the back seat and then came back out and kept smelling the trunk then returned back inside the car up on the front seat at which time the dog pulled the bag out from underneath the front seat. After the dog pulled the bag out from underneath the front seat, the dog was disengaged from the bag and taken away. At this point Pridemore went before a magistrate and obtained a search warrant.

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A search of the car revealed marijuana in the brown plastic bag found underneath the driver's seat and, additionally, a small quantity of marijuana and cocaine were found in the trunk of the vehicle.

REASONS FOR GRANTING THE WRIT

Whether Petitioner adequatley and procedurally proved that the false statements in the affidavit for the search warrant were sufficient to suppress the evidence seized therefrom in violation of his Fourth and Fourteenth Amendment rights.

As the Court said in Franks v. Delaware, 438 U.S. 154 (1978), it was faced with ". . . an important and long-standing issue of Fourth Amendment law. 438 U.S. at 454." As posed by the Court that question was

whether:

> "a defendant in a criminal proceeding ever has the right, under the Fourth and Fourteenth Amendments, subsequent to the issuance of an ex parte search warrant, to challenge the truthfulness of factual statements made in an affidavit supporting the warrant?" 438 U.S. at 154.

It was there held that in certain specified circumstances a challenge to the affidavit's factual veracity would be permitted. If the accused makes a substantial initial showing that a false statement knowingly and intentionally made or made with reckless disregard for its truth is included in the affidavit by the affiant and if such claimed false statement was necessary to the finding of probable cause by the judicial officer, then the Defendant is entitled to a hearing in the allegations. If, at such

hearing, he meets his burden of proof by a preponderance of the evidence in the issue and if it is concluded that the affidavit without the false information is insufficient to establish the requisite probable cause, then the search warrant is void and the evidence seized pursuant to it not admissible.

Franks v. Delaware, supra, is testament to the living vitality of the exclusionary rule which was judicially created to prevent and remedy police misconduct. United States v. Calandia, 414 U.S. 338 (1974); Stone v. Powell, 428 U.S. 465 (1976). It affirms the societal value that evidence seized in violation of an individual's rights under the Fourth and Fourteenth Amendments cannot be introduced at trial against that person.

Weeks v. United States, 232 U.S. 383 (1914); Mapp v. Ohio, 367 U.S. 643 (1961).

In the instant matter with the agreed procedure of hearing the suppression motion at trial, it was not discovered until the first police officer testified that there were false statements contained within the affidavit in support of the search warrant request.

The affidavit claims the drug dog was placed near the vehicle and indicated to his handler there were drugs of some type in the brown bag inside the car. This claim is wholly inaccurate. It was only after the dog was put in or allowed inside the vehicle that he "alerted" to the presence of drugs (Trial Transcript, pgs, 41-42).

A second false statement heightens

and compounds the first false statement. It is claimed that when the officers first approached Defendant and the other person they found "a small bag of marijuana in there (sic) possession." But the testimony revealed that when this event took place the second person was sitting on the marijuana in his own vehicle while the Defendant was not in there but in his own vehicle.

These two misstatements of fact, whether intentionally made or done with reckless disregard for their truthfulness were indispensable for the magistrate to make his independent determination of probable cause for the issuance of the warrant. Without the presence of these false statements, no probable cause existed

for the warrant's issuance.

In his Brief in Opposition to the Petition for Appeal the Commonwealth argued alternatively (1) that the misstatements were mere "incongruences" which should be viewed as harmless error at best; (2) that Defendant failed to articulate the Franks issue at trial; and (3) that even if the warrant were to fail, the search was justifiable and the fruits admissible due to the exigent circumstances exception to the warrant requirement. Chambers v. Maroney, 399 U.S. 42 (1970).

In regard to the claim by the Commonwealth that the Franks issue was incorrectly raised, it would seem important to note that in this factual setting as well as many,

many others the issue will arise during the course of a trial. It would be well for this Court after the Franks decision to instruct in the issue of how to properly raise the Franks issue when it is first discovered at the trial of the case. In regard to the independent exigent circumstances position of the Commonwealth relying upon the mobility of an automobile and the lesser invasion of privacy for a vehicle, Chambers v. Maroney, supra, and South Dakota v. Opperman, 428 U.S. 364 (1976) it is well to point out that Defendant was already under arrest at the time one of the policemen left the scene to go to the magistrate to get the warrant. Police are to be encouraged to use the warrant provision of the Fourth Amendment,

Steagold v. United States, 451 U.S. 204 (1981), rather than relying upon the warrantless exceptions. Such a choice demonstrates regard for the privacy sought to be protected while at the same time recognizing the need for intelligent and efficient police work. Henry v. United States, 361 U.S. 98 (1959).

The exigent circumstances exception to the warrant requirement in light of New York v. Belton, 450 U.S. 1028 (1981) would not assist the Commonwealth here. The issues posed by the instant matter are thus reduced to the procedural framework of a Franks situation where the articulation of an affidavit's purported lack of truthfulness does not arise until trial. If, as here,

Defendant, who has prior to trial moved to suppress evidence unrelated to a Franks problem and during the course of the trial, he demonstrates by a preponderance of the evidence that a false statement or statements have been made by the affiant, and but for those false statements there existed no probable cause for the issuance of the warrant, then the Court should decide that the procedural pre-trial requirements set forth in Franks have been met and the evidence seized pursuant to the warrant is not admissible.

CONCLUSION

It is respectfully submitted by the Petitioner that material false statements were used in the affidavit

for search warrant and without which the warrant could not have been issued. His convictions were based upon illegally obtained evidence which should not have been admitted at trial. A Writ of Certiorari should be granted to determine the proper Franks v. Delaware, supra, procedure when such problem is first made known at trial.

Respectfully submitted,

KENNETH COBBS

By _____
David E. Boone
George Wm. Warren, IV

CERTIFICATE

I hereby certify that true copies of this Petition for Writ of Certiorari were mailed to Gerald Baliles, Esquire, Attorney General for the Commonwealth of Virginia, 101 N. 8th Street, Richmond, Virginia 23219, and to Duncan P. Reid, Esquire, Assistant Commonwealth's Attorney for the County of Henrico, P. O. Box 27032, Richmond, Virginia 23273 on this 26th day of March, 1982.

George Wm. Warren IV

David E. Boone
George Wm. Warren, IV

Appendix

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday *the* 28th *day of* December, 1981.

Kenneth Cobbs, Appellant,

against Record No. 811545
Circuit Court Nos. 80F606 and 80F607

Commonwealth of Virginia, Appellee.

From the Circuit Court of Henrico County

Finding no reversible error in the judgments complained of, the court refuses the petition for appeal filed in the above-styled case.

A Copy,

Teste:

Allen L. Lucy, Clerk

By: Deputy Clerk

Opposition

Office - Supreme Court, U.S.
FILED
MAY 12 1982
ALEXANDER L. STEVAS,
CLERK

In The

Supreme Court of the United States

October Term, 1982

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COMMONWEALTH OF VIRGINIA

Respondent.

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

JOHN RICHARD ALDERMAN
Assistant Commonwealth's Attorney
Henrico County, Virginia
Henrico County Courthouse
Parham and Hungary Spring Roads
P. O. Box 27032
Richond, Virginia 23273

Counsel for Respondent

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STATEMENT OF THE CASE

Petitioner's Statement of the Case is accurate concerning the contents of the search warrant affidavit and the events surrounding the arrest, the search of the vehicle and seizure of illegal drugs found therein. However, Petitioner fails to state completely the events concerning the factual issues in this appeal.

Petitioner filed a motion to suppress evidence seized from his vehicle, alleging that the search warrant affidavit did not establish probable cause. The trial court overruled the motion. (Record, p. 28).

The factual issue counsel for Petitioner argued in the suppression hearing concerns the second paragraph of the affidavit, which reads

> At this time this affiant and several other officers approached these subjects and find a small bag of marijuana in *there* (sic) possession. (Emphasis added).

Petitioner argued that "there" was ambiguous because it did not indicate where the marijuana was found, and that without such information, there was no probable cause. (Record, p. 9).

The trial court acknowledged that the ambiguity "might cause the Court a little concern . . . (and) . . . they should have spelled it t-h-e-i-r," (Record, p. 27), nevertheless

> ". . . the word *there* is there for the magistrate and he may or may not know the difference between the two, but it certainly should be reasonable to interpret that the magistrate figures that *there* means in their possession regardless of how it's spelled . . . ." (Record, p. 27) (Emphasis added).

The testimony at trial disclosed that the marijuana was found in the front seat of the second vehicle, with the driver of that vehicle sitting on it. Petitioner had returned to his own vehicle when the police apprehended both subjects and found the marijuana. (Record, p. 46).

Petitioner alleges that this testimony "revealed" (Petition, p. 17) marijuana in one vehicle while he was in another, thus making the statement in the affidavit false. However, the only thing "revealed" by this testimony is that the driver of the second vehicle "was sitting on the marijuana"; counsel for Petitioner argued in the trial court that marijuana was found in one car and Petitioner in another. (Record, p. 9-10).

A second fact was "revealed" at trial which may make a second statement in the affidavit false. The testimony showed that the dog did not indicate the presence of drugs in Petitioner's vehicle until he had been inside of the vehicle. The affidavit reads

> The dog was placed *near* the vehicle and indicated to his handler there was drugs of some type in the brown bag inside of the 1976 black over gray Cadalic (sic). (Emphasis added).

What the Petition does not say is that when counsel for Petitioner heard this testimony he acknowledged it was "new evidence" (Record, p. 43), but he failed to question either of the witnesses about the possible conflict between the affidavit and their testimony. (Record, p. 43-44 and p. 63). At the conclusion of the Commonwealth's evidence, Petitioner renewed his motion to suppress because of the "different evidence than what we have in the affidavit," (Record, p. 64), but he did not ask for a hearing to consider the effect of the discrepancies upon the case against his client, nor did he make any showing that the witnesses had perjured themselves.

ARGUMENTS AGAINST GRANTING THE WRIT

I. The present case does not present an issue allowing a challenge to the veracity of a search warrant affidavit.

Petitioner fails to prove the prerequisites necessary to even demand a hearing on the validity of the search warrant affidavit, much less establish that the alleged falsity renders the warrant invalid. *Frank* v. *Delaware,* 438 U. S. 154 (1978).

Upon discovery of the alleged falsity, Petitioner made

no attempt to demonstrate whether the alleged false statements were made either "knowingly or intentionally, or with reckless disregard for the truth," or show that the two statements were essential to the finding of probable cause. Petitioner did not even request a hearing at which such determinations might have been made. (See *Franks,* 438 U. S. at 155-156). Petitioner's whole argument is predicated upon the mere assertion that the two statements in the affidavit are false. Even if they are false, *Franks* specifically held that allegations of negligence; i.e., misspelling "their" or innocent mistakes (typing "near the vehicle" when the affiant has personally observed the dog "inside the vehicle") are insufficient to invalidate the warrant. *Franks,* 438 U. S. at 171.

II. The evidence Petitioner seeks to have excluded would be admissible even without a search warrant.

Under the holding in *New York* v. *Belton,* 450 U. S. 1028, (1981) the validity of the search of Petitioner's car in this case does not depend upon the validity of the warrant. *Belton* held:

> When a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile. It follows from this conclusion that the officer may also examine the contents of any containers found within the passenger compartment, . . . whether it is open or closed . . . . *Belton,* 450 U. S. at 455.

In the present case, counsel for Petitioner acknowledges that the search was incident to an arrest (Record, p. 68) and the validity of the arrest is not challenged.

CONCLUSION

It is respectfully submitted that Petitioner failed to establish grounds under either the *Franks* decision or the *Belton* decision which would have required suppression of the evidence in this case. The trial court's decision to admit the evidence was consistent with both Federal and State law. Therefore, a Writ of Certiorari in this case should be denied.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA

By: John R Alderman

JOHN RICHARD ALDERMAN
Assistant Commonwealth's Attorney
County of Henrico, Virginia

JOHN RICHARD ALDERMAN
Assistant Commonwealth's Attorney
Henrico County, Virginia
Henrico County Courthouse
Parham and Hungary Spring Roads
P. O. Box 27032
Richmond, Virginia 23273

Counsel for Respondent

CERTIFICATE

I hereby certify that true copies of this Brief in Opposition to a Petition for a Writ of Certiorari were mailed to David E. Boone, Esquire, Attorney for the Petitioner, Suite 116, Shockoe Center, 11 South Twelfth Street, Richmond, Virginia 23219 on the ...17.... day of May, 1982.

John R. Alderman

JOHN RICHARD ALDERMAN